Filed 8/13/19 In re F.M. CA5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re F.M., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. F.M., Defendant and Appellant.	F076992 (Super. Ct. No. 17JL-00115-A) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Merced County. John D. Kirihara, Judge.

Kevin J. Lindsley, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Erin Doering, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Franson, Acting P.J., Meehan, J. and Snauffer, J.

INTRODUCTION

In January 2017, former minor F.M., then 16 years old, was working as a cashier at a fast food restaurant. D.T., also then a minor and a friend of F.M.'s, entered the restaurant in disguise, demanded the money from F.M.'s cash register, and departed with $181.99 in cash.

A juvenile petition was subsequently filed pursuant to section 602 of the Welfare and Institutions Code alleging F.M. committed conspiracy to commit petty theft (Pen. Code, §§ 182, subd. (a)(1), 484, subd. (a))[1] (count 1) and petty theft (§ 484, subd. (a)) (count 2). The People later amended the petition to allege F.M. committed conspiracy to commit attempted robbery (§§ 182, subd. (a)(1), 664/211) (count 1), attempted second degree robbery (§§ 664/211) (count 2), conspiracy to commit commercial burglary (§§ 182, subd. (a)(1), 459) (count 3), commercial burglary (§ 459) (count 4), conspiracy to commit theft (§§ 182, subd. (a)(1), 484) (count 5), and petty theft (§ 484, subd. (a)) (count 6).

F.M. denied the allegations and the matter proceeded to a contested jurisdictional hearing. After resting their case, the People moved to amend count 1 to conspiracy to commit robbery. The juvenile court thereafter found count 3 (conspiracy to commit commercial burglary) true, but found the other five counts not true. The court declared F.M. a ward of the court and placed him on probation subject to various terms and conditions.

On appeal, F.M. claims the court's true finding on the conspiracy to commit commercial burglary allegation is not supported by substantial evidence that he conspired to take property exceeding $950. The People argue that the juvenile court's finding is supported by substantial evidence but, if we disagree, they request we modify the finding to the lesser included offense of conspiracy to commit shoplifting. (§ 459.5.) In reply,

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1 All statutory references are to the Penal Code unless otherwise noted.

F.M. contends that conspiracy to commit shoplifting is not a lesser included offense of conspiracy to commit burglary. He also contends that reducing the finding to conspiracy to commit shoplifting would violate his right to due process given that the juvenile court found the allegation of conspiracy to commit theft not true.

We conclude the finding that F.M. conspired to commit commercial burglary is unsupported by substantial evidence as to the element of value and, because conspiracy to commit shoplifting is not a lesser included offense, the finding may not be modified on review. (§§ 1181, subd. 6, 1260.) The finding on count 3, conspiracy to commit commercial burglary, is therefore reversed.

FACTUAL SUMMARY

F.M. was a cashier at a fast food restaurant, a position he held for two or three months preceding the crime. One evening, shortly after he started his shift, an individual, later identified as D.T., approached F.M.'s register. D.T. was wearing a black, curly-haired wig and round glasses with rainbow-like reflective lenses. D.T.'s unusual appearance caught the attention of the employee who was assisting with filling orders, and she testified she had seen him in the restaurant at the same time the previous day, at which time he entered wearing the wig and glasses, sat at a table and watched the employees work.

After D.T. ordered a drink, F.M. turned to the employee assisting, who then left to fill the order. When she returned, D.T. was gone and F.M. said, "I think I got robbed." She responded, "What do you mean you think you got robbed? Either you did or you didn't." F.M. was quiet in response and the employee informed the shift manager. F.M. did not mention a gun.

F.M. subsequently stated that the man in the wig and glasses displayed a gun that was in his pants and demanded the money from F.M.'s register. F.M. handed over the money and the man left. The restaurant's surveillance cameras were not working at the

time, but the crime occurred during the dinner rush and no one other than F.M. reported seeing a gun despite the presence of many customers.

At the time of the crime, each cash drawer held $150 at the beginning of a shift. The cash limit for each register was approximately $250. When the limit was reached, the register would automatically notify the cashier that a cash drop was necessary and no further orders could be rung up on the register until the manager made a cash drop. F.M. was at the beginning of his shift at the time of the crime and, after he reported being robbed, the shift manager took his cash drawer to the back office. All of the bills were gone, but coins remained. Staff determined that $181.99 had been stolen.

The district manager came to the restaurant after learning of the crime and, after speaking with F.M., allowed him to leave for the day, although F.M. did not appear upset. The district manager and another employee also overheard F.M. on the phone. F.M. was talking to a friend, and he laughed and joked about being robbed. He asked to be picked up, telling his friend that he did not want to go home.

Fairly quickly, law enforcement identified F.M.'s friend, D.T., as the individual in the wig and glasses who came into the restaurant. The round, rainbow-lensed glasses and an airsoft pellet gun were recovered from D.T.'s house and although the wig was not located, D.T.'s father confirmed D.T. had such a wig. Police located black, curly hairs on the floor of D.T.'s room that appeared to be synthetic.

In addition, there was evidence that F.M. and D.T were together at F.M.'s house prior to F.M.'s shift at the restaurant, and D.T. picked F.M. up nearby after the robbery. They then attended a party, shortly before which F.M. received a text message regarding $100 in acid, which F.M. requested be delivered to the address where the party was being held.

DISCUSSION

I. Sufficiency of the Evidence

A. Legal Standard

"The Due Process Clause of the Fourteenth Amendment denies States the power to deprive the accused of liberty unless the prosecution proves beyond a reasonable doubt every element of the charged offense" (*Carella v. California* (1989) 491 U.S. 263, 265, citing *In re Winship* (1970) 397 U.S. 358, 364), and the verdict must be supported by substantial evidence (*People v. Zamudio* (2008) 43 Cal.4th 327, 357). On appeal, the relevant inquiry governing a challenge to the sufficiency of the evidence "'is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1055.) "The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Zamudio*, *supra*, at p. 357.) This standard, applicable to adults in criminal court, also applies to a juvenile court's findings of fact. (*In re B.M.* (2018) 6 Cal.5th 528, 536; *In re Gary H.* (2016) 244 Cal.App.4th 1463, 1477.)

B. Analysis

1. Conspiracy to Commit Burglary

"Section 182 prohibits a conspiracy by two or more people to 'commit any crime.' (§ 182, subd. (a)(1).) 'A conviction of conspiracy requires proof that the defendant and another person had the specific intent to agree or conspire to commit an offense, as well as the specific intent to commit the elements of that offense, together with proof of the commission of an overt act "by one or more of the parties to such agreement" in furtherance of the conspiracy.'" (*People v. Johnson* (2013) 57 Cal.4th 250, 257, quoting *People v. Morante* (1999) 20 Cal.4th 403, 416.)

Burglary, the target offense of the conspiracy in this case, "consists of an act—unlawful entry—accompanied by the 'intent to commit grand or petit larceny or any felony.'" (*People v. Montoya* (1994) 7 Cal.4th 1027, 1041, quoting § 459, fn. omitted.) As to entry with larcenous intent, the burglary statute is limited by section 459.5, subdivision (a), which was added to the Penal Code pursuant to Proposition 47. Effective November 5, 2014, the statute provides: "Notwithstanding Section 459, shoplifting is defined as entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, *where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars ($950)*. Any other entry into a commercial establishment with intent to commit larceny is burglary…." (§ 459.5, subd. (a), italics added.) "A defendant must be charged only with shoplifting when the statute applies" and, in subdivision (b), the statute "expressly prohibits alternate charging …." (*People v. Gonzales* (2017) 2 Cal.5th 858, 876.)

2. Evidence Insufficient to Show F.M. Conspired with D.T. to Take Property Exceeding $950

"A felony burglary charge [may] legitimately lie if there [is] proof of entry with intent to commit a nontheft felony or an intent to commit a theft of other property exceeding the shoplifting limit" (*People v. Gonzales*, *supra*, 2 Cal.5th at p. 877) and, evidenced by his express argument, the prosecutor was not unaware of section 459.5. Nevertheless, he elected to proceed on the theory that F.M. conspired with D.T. to enter the restaurant and "commit a theft or felony," and he specifically argued that this was not a shoplifting case. (*People v. Solis* (2015) 232 Cal.App.4th 1108, 1122 [prosecutors have broad discretion to determine which charges to bring]; § 954.) He also theorized, however, that the motive was obtaining money for the drug transaction and argued, in relevant part, that F.M. and D.T. were thinking, "'[W]e can only get $200, but that's all we need for a drug transaction."

Having made an election to pursue conspiracy to commit commercial burglary, the prosecutor bore the burden of proving not only that F.M. had the specific intent to commit conspiracy, but also that he had the specific intent to commit the target offense of burglary; that is, a nontheft felony or theft exceeding $950. (*People v. Johnson*, *supra*, 57 Cal.4th at p. 258; *In re E.P.* (2019) 35 Cal.App.5th 792, 798–799.) There is no evidence that F.M. and D.T. conspired to enter the restaurant to commit any crime other than larceny. The parties agree the amount taken was less than $200, but the crime of conspiracy does not punish the completed target crime or the attempted target crime. (*People v. Johnson*, *supra*, at p. 258.) Rather, the crime of conspiracy is complete once an overt act in furtherance of the conspiracy has been taken. (*Id.* at pp. 257–258.) Therefore, the issue is intent and whether there is sufficient evidence that F.M. and D.T. had the intent to steal property exceeding $950 in value. (*In re E.P.*, *supra*, at pp. 798–799.)

In an effort to secure affirmance of the juvenile court's true finding against F.M., the People advance two arguments: one, it is reasonable to infer that F.M. and D.T. deliberately committed the crime at a busy time to maximize their take and, two, their conspiracy extended to attempting to steal from other registers and individuals if possible. They also assert that F.M. "is unable to 'affirmatively demonstrate that the evidence is insufficient' to show that he intended to steal more than $950." On the facts of this case, we disagree.

This was an *inside job*: the evidence shows that the target crime of F.M.'s and D.T.'s conspiracy was theft of money from F.M.'s cash register, which was, by store policy and register function, limited to approximately $250. The evidence adduced during the hearing demonstrates that, at any given time, the cash register contained no more than this amount given the automated cash drop feature, which caused the register to cease working until a cash drop was completed. Although the People assert that there is no evidence showing that F.M. knew the cash register would stop working when it

reached a certain amount or that he knew what that amount was, we find their argument unpersuasive under the circumstances.

It is uncontested that F.M. had been a cashier at the restaurant for two or three months, at the start of each shift the cash drawer contains $150, and the register automatically prompts a cash drop at $250, approximately. At that point, no further orders could be rung up until the employee alerted a manager, who then conducted the cash drop. The district manager described the cash policy as "really, really, strict" and said that the frequency of the cash drops depends on how many customers come in. During busy periods, cash drops could occur frequently.

It is reasonably inferable that F.M., as a cashier, would not only have been aware of the cash drop policy but would have experience with the cash drop policy. We must view the evidence in the light most favorable to the People (*People v. Nguyen*, *supra*, 61 Cal.4th at p. 1055), but the prosecutor bore the burden of proof on the value element of the target crime and the People point to no evidence supporting a reasonable inference that a cashier with months of experience could perform his regular duties in ignorance of the cash drop policy and the register's approximate cash limit.

As to the People's other points, there is no evidence that F.M. and D.T. conspired to target the restaurant during dinner rush, hoping to maximize their take, but, in any event, F.M.'s register would at most contain approximately $250. There is also no evidence that they intended to steal from other registers or other individuals. The only counter register in operation was F.M.'s, and the theft was committed so quietly that apparently no one other than F.M. was aware of it, despite the fact the restaurant was having a rush and customers were milling around, including near the counter. "[S]peculation, supposition and suspicion are patently insufficient to support an inference of fact." (*People v. Franklin* (2016) 248 Cal.App.4th 938, 951; accord, *People v. Marshall* (1997) 15 Cal.4th 1, 35; *People v. Xiong* (2013) 215 Cal.App.4th 1259, 1268.)

Under these circumstances, there is a failure of proof that F.M. and D.T., in conspiring to steal from the restaurant, had the specific intent to take property in excess of $950. Accordingly, F.M. is entitled to reversal of the court's finding that he conspired to commit commercial burglary.

II. Modification of Verdict

A. Background

Finally, the parties disagree over whether we may exercise our statutory authority to modify the juvenile court's finding to reflect that F.M. conspired to commit shoplifting. (*People v. Eid* (2014) 59 Cal.4th 650, 659, citing *People v. Navarro* (2007) 40 Cal.4th 668, 678.) "Under section 1181, subdivision 6, a jury verdict not supported by the evidence may be modified if the record establishes the defendant's guilt of a lesser included offense. The requirement that the lesser offense be included in the greater 'is based upon due process considerations: A criminal defendant must be given fair notice of the charges against him in order that he may have a reasonable opportunity properly to prepare a defense and avoid unfair surprise at trial.' [Citation.] The requirement also preserves the jury's role as the finder of fact. The modification permitted by section 1181, subdivision 6 'merely brings the jury's verdict in line with the evidence presented at trial.' [Citation.] The reviewing court corrects the verdict '"not by finding or changing any fact, but by applying the established law to the existing facts *as found by the jury*."' [Citations.] [¶] To ascertain whether one crime is necessarily included in another, courts may look either to the accusatory pleading or the statutory elements of the crimes." (*People v. Robinson* (2016) 63 Cal.4th 200, 206–207, fn. omitted.)

"'Under California law, a lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser.' [Citation.] If a lesser offense shares some common elements with the greater offense, or if it arises out of the same

criminal course of conduct as the greater offense, but it has one or more elements that are not elements of the greater offense as alleged, then it is a lesser related offense, not a necessarily included offense." (*People v. Hicks* (2017) 4 Cal.5th 203, 208–209.)

B. Analysis

The People take the position that conspiracy to commit shoplifting is a lesser included offense of conspiracy to commit burglary under the statutory elements test and the accusatory pleading test and, therefore, we should reduce the juvenile court's finding against F.M. to conspiracy to commit shoplifting. (§§ 1181, 1260.) F.M. does not address the statutory elements test, but points out there is a split of authority regarding whether, in applying the accusatory pleading test to conspiracy claims, courts can consider the overt acts alleged and he urges us to follow the authority precluding consideration of the overt acts allegations.[2] (*People v. Cortez* (2018) 24 Cal.App.5th 807, 820 [agreeing with *People v. Cook* (2001) 91 Cal.App.4th 910, 921 that overt acts alleged in an accusatory pleading may suffice to give notice of lesser included offenses]; cf. *People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1709 ["[I]t is the description of the agreement within the accusatory pleading, not the description of the overt acts, which must be examined to determine whether a lesser offense was necessarily the target of the conspiracy."].)

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[2] F.M. also argues that because the juvenile court found the allegations that he conspired to commit petty theft not true, reduction of the court's finding of conspiracy to commit commercial burglary to conspiracy to commit shoplifting would usurp the court's factfinding role and violate his right to due process. We need not reach this argument given our determination that conspiracy to commit shoplifting is not a lesser included offense of conspiracy to commit burglary, but we observe that "[a]s a general rule, inherently inconsistent verdicts are allowed to stand." (*People v. Avila* (2006) 38 Cal.4th 491, 600, citing *United States v. Powell* (1984) 469 U.S. 57, 65.) This is because, while error "'most certainly has occurred' …, 'it is unclear whose ox has been gored.'" (*People v. Avila*, *supra*, at p. 600, quoting *United States v. Powell*, *supra*, at p. 65.) "An inconsistency may show no more than [the trier of fact's] lenity, compromise, or mistake, none of which undermines the validity of a verdict." (*People v. Lewis* (2001) 25 Cal.4th 610, 656; accord, *People v. Covarrubias* (2016) 1 Cal.5th 838, 890–891; *People v. Avila*, *supra*, at p. 600.)

1. Statutory Elements Test

The People assert, without citation to authority, that shoplifting is a lesser included offense of burglary under the statutory elements test and they cast both crimes as requiring intent to commit larceny. "Under the elements test, if the statutory elements of the greater offense include all of the statutory elements of the lesser offense, the latter is necessarily included in the former." (*People v. Reed* (2006) 38 Cal.4th 1224, 1227.) While intent to commit larceny is an element of shoplifting, burglary is not so limited and instead requires intent to commit larceny *or* any felony. As the commission of burglary does not necessarily also complete the crime of shoplifting, shoplifting is not a necessarily included offense of burglary under the statutory elements test. (*People v. Bernal* (1994) 22 Cal.App.4th 1455, 1458 [theft not lesser included offense of burglary, which can be committed without committing theft]; *People v. Tatem* (1976) 62 Cal.App.3d 655, 658 [same]; *People v. Hamilton* (1967) 251 Cal.App.2d 506, 510 [same].)

2. Accusatory Pleading Test

"Under the accusatory pleading test, if the facts actually alleged in the accusatory pleading include all of the elements of the lesser offense, the latter is necessarily included in the former." (*People v. Reed*, *supra*, 38 Cal.4th at pp. 1227–1228.) "[W]e consider *only* the pleading for the greater offense." (*People v. Montoya* (2004) 33 Cal.4th 1031, 1036, fn. omitted; accord, *People v. Cortez*, *supra*, 24 Cal.App.5th at p. 817).

The People also assert that the accusatory pleading test is satisfied: "[T]he petition alleged that [F.M.] and D.T. planned to enter [a restaurant] (a commercial establishment), while [F.M.] was working as a cashier (during business hours) with the intent to facilitate burglary of the store (to steal as much money as possible from the cash register)." We are constrained by the pleading to conclude otherwise.

Here, as to count 3, the petition alleged F.M. conspired "together with another minor to commit the crime of Commercial Burglary, in violation of Section 459 of the

Penal Code …." The petition further alleged three overt acts: F.M. and D.T. planned a date, time and place to commit a *burglary* of the restaurant, D.T. "acquired a disguise … to hide his identity during the *burglary*," and F.M. "arranged for himself to be working as a cashier at [the restaurant] at a specific time to facilitate [D.T.'s] *burglary* of the store." (Italics added.) Even if we consider the overt acts allegations (*People v. Cortez*, *supra*, 24 Cal.App.5th at p. 820; *People v. Cook*, *supra*, 91 Cal.App.4th at p. 921), count 3 as alleged broadly identifies the object of the conspiracy as commercial burglary, which is insufficient to provide notice that the object of the conspiracy was to commit shoplifting (see *People v. Cortez*, *supra*, at p. 821 [overt acts alleged not sufficient to support conspiracy charge where there was no allegation of agreement or conspiracy to commit target offense]).

In conclusion, because conspiracy to commit shoplifting is not a lesser included offense of conspiracy to commit burglary under either the statutory elements test or the accusatory pleading test, we may not modify the juvenile court's finding to conspiracy to commit shoplifting.

DISPOSITION

The juvenile court's true finding on count 3, conspiracy to commit commercial burglary, is reversed as unsupported by substantial evidence.